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In the Supreme Court of the United Sta

OCTOBER TERM, 1984

EUGENE KISIELOWSKI AND UNITED TEREX, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the holding of the court of appeals that their suit was not properly brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, because their claims sound in contract rather than in tort.

1. In 1979, petitioner United Terex, Inc. (UTI), a Pennsylvania corporation, was awarded a contract to produce 3120 aerial cargo slings for the United States Army Aviation Research and Development Command in St. Louis, Missouri (Pet. App. 43a). Between July 1980 and March 1981, UTI and its chief executive officer, petitioner Kisielowski, had a series of disputes with William Hunt, the contracting officer, concerning UTI's performance (*id.* at 6a, 44a-47a).

After Hunt terminated UTI's 1979 contract, the United States Troop Support and Aviation Materiel Readiness Command invited bids to reprocure the 3120 aerial cargo slings (Pet. App. 49a). UTI submitted the lowest bid. The contracting officer for the reprocurement contract, George Mergel, learned about UTI's earlier problem with this contract and, pursuant to 15 U.S.C. 637(b)(1)(F)(7)(A), he submitted the matter to the Small Business Administration (SBA) for a determination of whether it would issue UTI a Certificate of Competency. The SBA declined to issue the Certificate and UTI's bid was rejected (Pet. App. 6a-7a, 51a).

2. Petitioners filed the instant action in the United States District Court for the Eastern District of Pennsylvania against the two contracting officers and the United States.[1] The claims against the United States, which were based solely on the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671 *et seq.*, alleged as follows: the United States had conspired to punish and had punished petitioners summarily by terminating UTI's first procurement contract for aerial cargo slings and by refusing to accept UTI's bid on the later contract (Counts I and II); the United States had interfered with petitioners' "prospective advantage" by injuring petitioners' reputation as a government contractor (Count III); the United States had violated petitioners' due process rights by terminating the contract summarily (Count IV);

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[1]The counts of the complaint against the contracting officers alleged that they had conspired to deprive petitioners of constitutional and contractual rights. The district court dismissed the claims against Mergel on the grounds that he had not been personally served with process under Fed. R. Civ. P. 4(d) (Pet. App. 7a-11a) and that the court lacked personal jurisdiction over him. The court also dismissed the suit against Hunt for want of personal jurisdiction (*id.* at 11a-16a). The court of appeals affirmed those dismissals (*id.* at 2a-3a), and petitioners have presented no question concerning the individual defendants in their petition.

and the United States had intentionally inflicted mental distress on petitioner Kisielowski by its handling of the contracts (Count V) (Pet. App. 28a-32a).

The district court dismissed all of petitioners' claims against the United States (Pet. App. 6a-24a). The court held that Count III of the complaint alleging "interference with prospective advantage" was a claim arising out of "interference with contract rights" within the meaning of 28 U.S.C. 2680(h), and therefore recovery under the Tort Claims Act was barred (Pet. App. 16a-17a).[2] With respect to Count V—intentional infliction of emotional distress—the court held that the facts alleged did not constitute sufficiently outrageous behavior to warrant recovery under Pennsylvania law (*id.* at 18a-20a). Finally, with respect to Counts I, II and IV, the court held that the claims all involved basic breach of contract allegations and were not "essentially" tort claims (*id.* at 21a-24a). Accordingly, the district court concluded that these claims should have been brought in the United States Claims Court pursuant to the Tucker Act, 28 U.S.C. 1346(a)(2) and the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.* (Pet. App. 21a).

The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-5a). The court of appeals rejected petitioners' contention that Counts I, II and IV are tort actions and instead agreed with the district court that the three counts "are contract claims cast in tort language" (Pet. App. 3a). The court of appeals also upheld the dismissal of Count V on the ground that "the alleged conduct, even if proven to

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[2]The court also found that petitioners had failed to present this claim to the Secretary of the Army when they sought administrative relief under 28 U.S.C. 2675(a). Accordingly, the court held alternatively that this claim was barred for failure to exhaust administrative remedies (Pet. App. 17a-18a). Petitioners did not seek further review of the district court's dismissal of Count III.

be true, is plainly not of the 'extreme and outrageous' type as to be actionable as a matter of law" (*id.* at 4a).

3. Petitioners argue (Pet. 12-15) that the court of appeals applied a "test" different from that used in other circuits in deciding whether claims are purely contractual or allege a tort. In fact, there is no "test" available for making the fine distinctions sometimes called for by the jurisdictional confluence of the Tucker Act and the Federal Tort Claims Act. Compare *Martin* v. *United States*, 649 F.2d 701, 704-705 (9th Cir. 1981), with *id.* at 705-706 (Ferguson, J., dissenting).[3] Instead, each case must be evaluated on its own facts.[4] The decision of the district court, affirmed by the court of appeals, that petitioners' allegations in Counts I, II and IV are more properly viewed as contract claims than tort claims is reasonable and has no precedential effect beyond petitioners' case. Accordingly, further review by this Court is not warranted.

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[3]In *Martin* v. *United States*, 649 F.2d at 705, the court stressed that other FTCA cases that had been dismissed as being contractual in nature "involve breaches in commercial relationships leading to loss of profit or other purely economic harm." See, *e.g.*, *Woodbury* v. *United States*, 313 F.2d 291 (9th Cir. 1963). This statement is equally applicable to the instant case.

[4]Petitioners are correct in contending (Pet. 12) that tort claims occasionally may arise out of contract disputes. Thus, in *Aleutco Corp.* v. *United States*, 244 F.2d 674 (3d Cir. 1957), the court held that plaintiff's attempt to recover property that the Navy was holding and refused to release was a classic tort suit for conversion. Similarly, in *Martin* v. *United States*, 649 F.2d at 705, the court held that California tort law recognized liability when a vendee of property was injured by an unsafe condition left by the vendor. This duty was independent of any contractual obligation to repair the unsafe condition. Indeed, the courts below implicitly recognized this distinction when they considered petitioner Kisielowski's claim of intentional infliction of emotional distress. That claim arose out of the handling of the contracts, but was based on a separate, identifiable tort theory recognized by Pennsylvania law. Petitioners make no attempt to indicate precisely how their allegations in Counts I, II and IV state a claim for recovery recognized under Pennsylvania tort law.

As the district court held, petitioners' allegation that the United States "punished" them summarily is based solely on the termination of the first contract and the refusal to award the second one. These are unquestionably contract issues that should be presented to the Claims Court, which is better suited to judge whether petitioners performed their contract and, if not, whether the breach was justified. See *Woodbury* v. *United States*, 313 F.2d 291, 295 (9th Cir. 1963). Indeed, petitioners have such a suit pending in the Claims Court. See Pet. 7 n.2.

With respect to Count IV, petitioners do no more than recast their "summary punishment" allegation into a due process claim. But the claim remains at bottom a breach of contract issue, because if petitioners did not perform as required and that nonperformance was not excusable, then termination of the contract was fully justified. If termination was not justified, petitioners have a remedy under the Tucker Act.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[5]To the extent that petitioners seek to advance a constitutional tort claim against the United States, that claim is barred by sovereign immunity. This Court has held that the United States has not waived its immunity from suits seeking damages for due process violations (see, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 400-402 (1976)), even when those suits are filed under the FTCA. See *Carlson* v. *Green*, 446 U.S. 14, 23 (1980); see also 28 U.S.C. 2680(h) (prohibiting, with exceptions not applicable here, intentional tort claims against the United States).